No. 20,761

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1281, AFL-CIO,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF ON BEHALF OF RESPONDENT UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1281, AFL-CIO

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I. JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for the enforcement of an order issued against the Respondent, referred to herein also as the Union, on May 17, 1965 pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 USC Sec. 151, *et seq.*). The Court has jurisdiction under Section 10(e) of the Act.

The National Labor Relations Board affirmed the rulings of the Trial Examiner, but failed to adopt his recommendation. The Trial Examiner concluded that the General Counsel had failed to sustain the burden of proving that the Union had committed unfair labor practices, and recommended that the complaint be dismissed.

II. ISSUE

The issue is whether or not the Union failed and refused to refer Ivan DiBoff for employment with Raber-Kief, an interstate employer doing construction business in the State of Alaska. The Union contends that DiBoff was not referred because he failed to qualify for referral pursuant to an exclusive referral agreement between the Respondent Union and Raber-Kief.

III. FACTS

The Respondent and the Alaska Chapter of the Associated General Contractors of America have an exclusive hiring agreement providing for the referral of qualified applicants for carpentry work from two lists. List No. 1 consists of men who (a) have been for the preceding year residents of Respondent's jurisdictional area; or (b) have worked in the carpentry trade within Respondent's jurisdictional area in each of the preceding two years. List No. 2 consists of all other qualified applicants. The agreement gives

job preference to employees on List No. 1 with the exception that contractors may employ one carpenter out of each eight carpenters on or qualified for List No. 2 without regard to the said preference. The agreement provides that: "Of the first eight carpenters employed on each job one may be the exception, thereafter the exception shall be only after seven other carpenters are employed. This ratio of List No. 2 to List No. 1 carpenters will not be exceeded at any stage or period of project."

When an employer requests the referral of a List No. 1 carpenter, by name, that carpenter is entitled to referral regardless of his placement on the out-of-work list, and even though his name is not physically on the list. A request for a specific List No. 2 carpenter, by name, is also honored unless the one to seven ratio would preclude the referral of a List No. 2 carpenter, and this is so even though his name is not physically on the list. When the request is not for carpenters, by name, referrals are made in accordance with the numerical order on the out-of-work lists, and in such cases, the List No. 2 is not used until all names on List No. 1 have been exhausted.

A request by an employer for a particular carpenter can be made through the employee himself. This is an expedient that the Union has developed through successful usage.

However, this expedient is extra-contractual, and can be practiced only when such a referral would not be inconsistent with known facts, or a reasonable belief that an employer is not requesting a particular

employee. The record is barren of any support for the existence of such a thing as a "continuing request" for referral. A continuing and specific preference was stated for two employees, Osnes and Nicolaysen, as will be discussed herein.

DiBoff is a man 77 years of age and has worked in the jurisdictional area of Respondent for many years. He was absent from the State of Alaska from November 1961 to May 1963, during which time he was in the State of Hawaii following his trade as a carpenter. He maintains a residence in Edmonds, Washington.

When DiBoff returned to Alaska in May, 1963, he talked with Ben Perkins, Respondent's finance secretary, regarding a referral. Perkins concluded that DiBoff should be placed on List No. 1, and he based this conclusion on the premise that DiBoff did not establish a home in Hawaii. This was not in accordance with the provisions of the hiring hall agreement, and shortly thereafter when the matter came to the attention of Business Agent Robert Powell, he removed DiBoff's name from List No. 1 and placed it on List No. 2. DiBoff's position on List No. 2 was 28th.

Although DiBoff was on List No. 2, he was qualified for referral to an employer if requested by that employer and if the ratio of List No. 2 men to List No. 1 men in the employ of the particular employer did not exceed one to seven. Otherwise, DiBoff would be eligible for referral only after all men on List No. 1 had been offered employment and after those that

preceded him on List No. 2 had been offered employment.

In the early part of June, 1963 DiBoff talked with George Woodward, a foreman on the Monta Vista job of Raber-Kief, regarding employment. Woodward asked Link Morse, the general superintendent on the Monta Vista project, to request that DiBoff be referred by Respondent. DiBoff stated that he wished to use his own tools, which had not arrived in Alaska at that time, and stated that he would be ready to go to work when he received his tools. His tools arrived in the latter part of June, 1963, and from then on DiBoff made frequent visits to the Union hall and to the jobsite seeking employment. *There is no evidence that Morse made a request for DiBoff. Respondent denies receiving a request from Morse, and Morse did not testify.* Woodward could only assume that it was made. Nevertheless, DiBoff communicated to Business Agent Powell that a job with Raber-Kief was waiting for him if he could obtain a referral. This was not true, and could not be proven.

The record establishes that DiBoff was not denied hiring hall privileges. When he registered, he was re-registered on List 2, the proper list. This re-registration is not the subject of this charge. The only basis for asserting an unfair labor practice at this point is if DiBoff had a job and this the General Counsel failed to do. The trier of fact so found and the NLRB had no basis for finding otherwise.

In the latter part of June, 1963, on or about June 23, 1963 Woodward made a telephone request of the

Respondent for three carpenters—DiBoff, Osnes and Torstein Nicolaysen, all List No. 2 carpenters. The request was refused on the grounds that they were List No. 2 men. Woodward testified that he needed these men very badly for the type of work he felt sure they could do, and he took them personally to the Union hall. Powell explained to him that under no circumstances could he dispatch any one of the three because of the fact that Woodward had too many List No. 2 men on the job at the time. Powell had previously dispatched men pursuant to Woodward's request, but some of these had been terminated as incompetent. A few days after the request for DiBoff, Osnes and Nicolaysen, Powell visited the jobsite and brought with him a carpenter named Hansen, who was an elderly gentleman. Woodward informed Powell that he could not use Hansen, as the work he then had required younger men who could climb up and down scaffolds. He asked Powell to send out Nicolaysen and Osnes. Powell told him that if he would put Hansen to work, he would send out one of the two younger men. Woodward asked that he send both of them. Powell refused to do this, and that ended their conversation. The next morning Osnes came to the job with a referral slip. Woodward then placed a call for Hansen and Nicolaysen, and these men were dispatched and put to work. It will be recalled that being 77 years old, DiBoff is not a young man.

Following the June 23rd request for DiBoff, Woodward did not again make a specific request for Di-

Boff, but he told DiBoff that any time that he could get a referral slip, he had a job at the Monta Vista project. This is not adequate as a request.

On or about June 23, Woodward was promoted from foreman to general superintendent at the Monta Vista project, succeeding Link Morse.

In the latter part of July 1963, Raber-Kief began hiring carpenters for the Adak project. Louis Taylor, office manager for Raber-Kief was in Anchorage, Alaska, during this time hiring personnel for the Adak project. DiBoff was recommended by Woodward for employment; Taylor placed a request by telephone with Respondent for DiBoff. On another occasion, during this same time, Taylor talked with Powell regarding DiBoff and was told by Powell that he could not be dispatched because he was not on List No. 1. During this time, DiBoff visited both the Union hall and the office of Taylor regarding employment, and Taylor told him that if DiBoff could get Powell to dispatch him, he would send him to Adak.

The Trial Examiner found and concluded that DiBoff was specifically requested for the Monta Vista project on or about June 23, 1963, and for the Adak project during the time carpenters were initially employed for that job, near the end of July, 1963, and that DiBoff continually thereafter made known to Respondent that Raber-Kief desired his employment. The specific requests were turned down by Powell on the grounds that DiBoff was a List No. 2 carpenter and that the ratio of List No. 2 carpenters to

List No. 1 carpenters did not warrant his referral. Respondent further contends that following the specific requests in June and in July DiBoff was not again requested by Raber-Kief until about September 5th or 6th, and that during the interval other men were requested specifically. Pursuant to this request, DiBoff was referred for employment on September 10, 1963 on the Adak project. The period during which he had been requested and not referred was from about June 23, 1963 to September 10, 1963.

Counsel for General Counsel contends that DiBoff continuously made known to Respondent that Raber-Kief requested him and that DiBoff was discriminated against as evidenced by the referral of other List No. 2 men, and that Powell's statements to other persons evidence his animosity for DiBoff as his motive for not referring him.

However, the record is quite clear that during this period the employer was making specific requests for carpenters by name, and never for DiBoff by name. The reason for this, according to the General Counsel's witness and the National Labor Relations Board's decision, was that after the first request for DiBoff, the employer, for reasons of its own, "gave up hope" of getting DiBoff, told DiBoff he was wasting his time, and never requested DiBoff again. The reason for the lack of request was what the employer believed, not what the facts actually were. Nonetheless, regardless of what the reason was, the record is uncontradicted that there was no "continuing request" but quite the contrary—the original re-

quest was rescinded and withdrawn because it was erroneously believed to be a waste of time.

Records of Raber-Kief show the following carpenters, who were List No. 2 men, to have been employed on the Monta Vista project from the latter part of June, 1963 to September 10, 1963:

June 21 (Friday):	Jacob Morken
June 26 (Wednesday):	Ashjarn Saelvik
July 2 (Tuesday):	Narvald Osnes
July 3 (Wednesday):	Torstein Nicolaysen

Records of Raber-Kief show that the following carpenters, who were List No. 2 men, were employed on the Adak project from its inception to September 10, 1963:

June 21 payroll:	Hal Vosberg, foreman
August 4 payroll:	Ivan E. Wood
August 18 payroll:	Wm. T. O'Shaughnessy, foreman
August 25 payroll:	Jay S. Wymer

Payroll records of Raber-Kief show that at all times material herein the ratio of List No. 2 men to List No. 1 men was at maximum or exceeded maximum. The turnover of employees resulted in frequent changes in the ratio. The termination or quitting of List No. 1 men could cause a ratio-excess of List No. 2 men; also the records indicate that on occasions extra List No. 2 men were employed causing a ratio imbalance at least temporarily. This could be from erroneous calculations of the ratio by Respondent due to the fluidity of the employment situation and re-

quirements, or due to laxity by Respondent in adherence to the 7 to 1 ratio, or due to knowledge by Respondent of impending employment of, or changes in status of, List No. 1 men, which would then bring the ratio into balance.

The records do not indicate at any time a ratio shortage of List No. 2 men in the employ of Raber-Kief. From this there appears to have been no opening for DiBoff. But, as indicated above, some List No. 2 men were referred.

Until List No. 1 is exhausted, a List No. 2 man can get employed only upon specific request of an employer and then only provided the ratio is not exceeded. It can then be concluded, in absence of evidence to the contrary, that the List No. 2 men named above were specially requested by Raber-Kief. There is no testimony regarding the circumstances surrounding the employment of Morken, Saelvik, and Freeberg on the Monta Vista project nor on the four List No. 2 men hired on the Adak job. The fact that Saelvik worked only two days, coupled with Superintendent Woodward's testimony that some unnamed carpenters referred were not competent, and coupled with the continued referral of carpenters, suggests that Saelvik was one of the incompetent referrals; and thus in turn suggests that he may not have been requested by the employer. But such conclusions are mere conjectures and not based on adequate evidence. Counsel for General Counsel did not identify during the hearing the List No. 2 men allegedly referred in preference to DiBoff (except possibly Osnes and Nic-

olaysen). He indicated that an analysis of the payroll record of Raber-Kief and the exhibits showing the list placement of carpenters would reveal List No. 2 men employed by Raber-Kief and their periods of employment. This is quite true, but the payroll records do not reveal the circumstances surrounding the employment of these men. No evidence was elicited from Raber-Kief or the employees involved or from Respondent on this matter, and Respondent, not being informed as to the names of the carpenters allegedly referred in preference to DiBoff, offered no testimony on this matter. Two of the List No. 2 men on the Adak job were foremen and a third, Wood, had worked all season for Raber-Kief on the Monta Vista job. These facts taken from the payrolls would "indicate" an employer preference for these men over DiBoff. As to the fourth, Wymer, employed during the August 25 payroll, there being no testimony as to the circumstances of his employment, this referral was not discriminatory as to DiBoff. The same is true as to Jacob Morken and Ashjarn Saelvik employed June 21 and June 26, respectively, on the Monta Vista job.

Evidence was adduced concerning the referral and employment of Osnes and Nicolaysen, and this is set forth in a prior paragraph. Powell had tried to get Woodward to employ a List No. 1 carpenter, Hansen, on the occasion; but he was rejected primarily because of his physical limitations due to his age. Woodward then urged and bargained with Powell to dispatch two young carpenters, Osnes and Nicolay-

sen. Finally, Powell did send Osnes, and then after a specific request for Hansen and Nicolaysen, they were dispatched the next day.

The case against the Respondent Union is based upon alleged personal animosity between DiBoff and Powell. This stems from an incident in 1960 when DiBoff was reprimanded by Powell for permitting laborers to perform carpenters' work; and from a 1963 incident when DiBoff campaigned against Powell. DiBoff's behavior during the referral incidents angered Powell.

Regardless of Powell's feelings toward DiBoff, Powell was obliged not to discriminate in favor of DiBoff, just as the law required him to not discriminate against DiBoff. The collective bargaining agreement contains a clause (Article V, Section 2) which provides for settlement of disputes by arbitration. A dispute over the hiring hall operation is included, and may be referred to arbitration.

IV. ARGUMENT

A. LACK OF REQUEST FOR REFERRAL OF DiBOFF.

Due to the failure of the General Counsel to produce testimonial or documentary evidence that DiBoff actually had a job offer from Morse, no unfair labor practice may be attributed to the Union's actions in failing to refer DiBoff earlier than June 23, 1966.

The evidence is undisputed that the first specific request for DiBoff was made on June 23, 1963 when

it was made along with a request for two other carpenters. All three were List No. 2 employees, and all three, not just DiBoff, were rejected, since the List No. 1 and List No. 2 ratios did not permit their hire. DiBoff was again requested and rejected in July for the Adak project because of the List No. 2 quota.

Since other List No. 2 carpenters were referred in this time, it is essential to know where DiBoff stood on the list with regard to those who were referred. This is true regardless of whether or not there were more List No. 2 men referred than was warranted by the quota, for if exceptions were made they must have been made on a nondiscriminatory basis. The record offers no support that the other men were referred out of order or bypassing DiBoff.

Therefore, the only theory which the National Labor Relations Board could use it that DiBoff was specifically requested. The record is also of no support to the General Counsel for on the occasions when the employer requested DiBoff it was impossible to send him. The Board, therefore, adopted the General Counsel's theory that the request for DiBoff having once been made, it was "pending" continuously at all times thereafter. The General Counsel, on page 11 of its brief, stated that Powell knew that the Company had a "continual request" for DiBoff, citing the transcript pages 186-187. Those pages contain no evidence competent to support the contention.

The facts negate the contention that the request for DiBoff was pending after having once been made in June. If this is what the employer intended,

why was a second specific request made for him in July? More significant is the fact that as individual openings appeared, other men were specifically requested for each such openings.

Rather than indicating a pending request for DiBoff, this would indicate to any reasonable man that other List No. 2 men were preferred by the employer. A referral of DiBoff under these circumstances of someone else's being specifically requested, would have been in violation of the contract, and possibly the basis of unfair labor practices.

The Board explains this lapse in its theory with the statement that the employer was resigned to the fact that DiBoff would not be referred—*based solely upon what DiBoff had told him.* This is of course a concession that there was no "pending" request for DiBoff. Nonetheless, assuming it is the excuse for failing to renew a request for DiBoff, it is not a legitimate excuse. The Respondent Union cannot be bound by what the employer thought. This impression is the entire basis for the unfair labor practice charge. The record shows that when DiBoff was requested in September, and the ratio permitted it, he was dispatched. The only reason he was not dispatched before that was the lack of a request at an appropriate time. This decision was controlled by the employer, in reliance upon DiBoff's statements.

The legality of the collective bargaining agreement is not in issue here. It is consistent with the National Labor Relations Act to give preference to certain employees over others as long as the basis for the pref-

erance is not upon a protected activity. (*Typographers Local 6* [1961] 133 N.L.R.B. 1052.) The use of Lists No. 1 and No. 2 as a basis for a preference is legal.

The basis for establishing an unfair labor practice in this type of case must be convincing evidence of hostility, coupled with a substantial deviation from a legal hiring hall practice (*Iron Workers, Local 433, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO* [1965], 151 N.L.R.B. No. 113). There is no evidence of a "substantial deviation" in this case. The Union refused to refer a member on the valid ground that there were not sufficient List No. 1 carpenters to justify his referral.

Since this initial request rejection was not unlawful, the alleged unfair labor practice must be premised upon some specific event. But there is no such incident. Later requests did not include DiBoff; in fact, there were named carpenters for each specific opening. The Union could only conclude that DiBoff was not wanted at each of these times. It is contended by the General Counsel that the substantial deviation occurred when other List No. 2 carpenters were dispatched by name in excess of the ratio. As indicated above, the record established by the General Counsel is barren with regard to the employment of all of the List No. 2 people except Osnes and Nicolaysen; this incident involving these two can be the only premise of a charge, yet at this time, if there was a waiver of a ratio, it was not discriminatory as to DiBoff for Osnes and Nicolaysen had been re-

quested by the employer at that time, and DiBoff was not similarly situated with these men. It was incumbent upon the General Counsel to establish a record of discrimination by developing the facts surrounding the hire of the other List No. 2 men. The Court cannot infer that an unfair labor practice has been committed (*Cupples Co. Mfgrs. v. NLRB,* 106 Fed 2d 100 [C.A.-8 1939]; *NLRB v. Lion Shoe,* 97 Fed 2d 448 [C.A.-1 1938]).

B. ALLEGED HOSTILITY ON THE PART OF POWELL.

Although it is the fact that passage of time alone will not necessarily eradicate hostility, where three years intervene between incidents, some more tangible evidence of bias is necessary. The first incident occurred in 1960 between the two men; then in 1963 the second incident took place. The second incident seems to have arisen from DiBoff's placement on List No. 2 and his failure to receive preferential treatment. DiBoff complained to the International and campaigned against Powell on a personal basis. Powell's rejoinder was to doggedly maintain that DiBoff properly belonged on List No. 2 with only such rights as are incident to List No. 2. Powell also maintained that there would be no exceptions made for DiBoff. There is no proof that exceptions were made for anyone else (see the discussion of Osnes and Nicolaysen, *supra*). The record shows that DiBoff was ultimately referred when the employer did what he should have done long before; he asked for DiBoff

by name. This certainly establishes that the procedures were honored regardless of personal feelings.

Assuming this is not correct, then to commit an unfair labor practice the Union must discriminate against a person for participating in protected activities. The protected activities found by the National Labor Relations Board were the complaint to the International and campaigning against Powell. The record establishes that both of these activities occurred *after* DiBoff failed to get a referral. Therefore, the original refusal to refer could not have been an unfair labor practice, and the decision of the National Labor Relations Board is patently incorrect. This fact also minimizes the likelihood that subsequent refusals were illegally motivated as well.

C. FAILURE OF DiBOFF TO EXHAUST ADMINISTRATIVE REMEDIES.

In the event that a wrong was done to DiBoff or the employer, or they thought one was done, a speedy remedy is contained in the contract in the form of the grievance procedure. This administrative remedy was designed to handle hiring hall problems as well as any other dispute. It would effectuate the policies of the Act to require parties to first resort to the grievance procedure, especially when they are not estopped from filing an unfair labor practice as well. The grievance procedure would permit a Union to rectify an error at the earliest possible opportunity at the least cost and expense to all persons, including the employee.

A hiring hall is extremely complex, especially one servicing many employers, and involving an intricate balance of List No. 1 to List No. 2. It is not difficult to make an error, for employees in the industry, as well as the demand for them, are flexible and transient.

Fairness to the parties necessitates that the parties exhaust this administrative remedy. The cases support this conclusion (*Spielberg Mfg. Co.* [1955] 112 N.L.R.B. 1080).

V. CONCLUSION

There was no unfair labor practice committed in failing to refer DiBoff on the occasion in early June, 1963. No evidence was submitted to prove a request, and the NLRB had no basis for so holding. Subsequent requests for DiBoff could not be honored due to the ratio. Consequently, an unfair labor practice was committed only if a request for DiBoff continued in effect after having once been made. No evidence would substantiate this theory, and the proof would indicate that requests do not continue in effect. The employer requested other persons by name for each vacancy. In fact, the employer testified that he did not request DiBoff because he didn't think he could get him. The basis for this belief comes solely from what he was told by DiBoff. The Union is not responsible for it and cannot be bound by it.

The Court should exercise its independent judgment after a review of this matter and refuse to

order compliance with the Board's order, and dismiss the complaint.

Dated, San Francisco, California,
July 20, 1966.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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